



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Norden Service Company, Inc.
File: B-235526
Date: August 22, 1989

DIGEST

1. New grounds of protest raised for the first time in the protester's comments on the agency report are untimely where the protester received the information which formed the basis for the new grounds of protest over a month before the comments were filed.
2. In a negotiated procurement the contracting agency has broad discretion in making cost/technical tradeoffs. Award to higher rated offeror with higher proposed costs is not objectionable where agency reasonably concluded that cost premium involved was justified considering the technical superiority of the selected offeror's proposal.
3. Agency failure to inform the protester in the notice of award of the reason its proposal was not accepted is a procedural defect which does not provide a basis on which to sustain a protest.

DECISION

Norden Service Company, Inc., protests the award of a contract to Comptek Research Inc., under request for proposals (RFP) No. N00140-88-R-RD06, issued by the Navy for computer software support services. Norden essentially argues that the award notification letter it received was inadequate and complains that the Navy's selection of Comptek's higher rated but more costly proposal was arbitrary.

We deny the protest in part and dismiss it in part.

The RFP contemplated the award of a cost-plus-fixed-fee contract for 307,710 staff-hours of nonpersonal services. It provided that award would be made on the basis of the

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proposal determined to be most advantageous to the government, cost and other factors considered. It listed five evaluation areas, the first two of which were of equal importance and the most important. The remaining areas were listed in descending order of importance. The areas follow:

1. Corporate Past Experience
2. Personnel Resources
3. Management Plan/Technical Approach
4. Contractor Facilities
5. Cost and Cost Realism

The agency received three proposals by the due date. The proposals were rated under the first four factors as either highly acceptable, acceptable, or unacceptable and given an overall rating. After best and final offers, the awardee had ratings of highly acceptable in all categories with an overall rating of highly acceptable. The protester received a rating of acceptable in the first two areas, highly acceptable in the remaining two areas and had an overall rating of acceptable. The awardee's final proposed cost, including the fixed fee, was \$7,857,091 which was adjusted to \$8,213,908 after the agency's cost realism analysis. Norden's final proposed cost, including fee, was \$7,792,533 which the agency adjusted to \$7,816,514. The agency also calculated the cost impact of awarding to Norden with its lower rated technical proposal. In order to quantify the difference between the offerors in the areas concerning company and personnel experience, the agency determined that the cost to the government to bring Norden's proposal up to the level of the awardee's was \$601,606. When the difference in technical quality was thus factored out by increasing the protester's costs by \$601,606, Norden's cost was considered to be \$204,212 more than Comptek's and the agency decided to make award to Comptek.

In its initial protest to our Office the protester acknowledged that the agency could award to a higher cost, higher technically rated offeror but argued that since the notification of award it received did not indicate that Comptek was technically superior, it was "forced" to assume that the proposals were technically equal and that consequently, the agency's award to a higher-cost offeror was improper. In its comments on the agency report, the protester argues that since it was not informed of the reason it did not receive award until after it filed a protest, the arguments it raised in its comments challenging the agency's technical evaluation of the proposals and the reasonableness of the cost realism and cost impact analysis are timely.

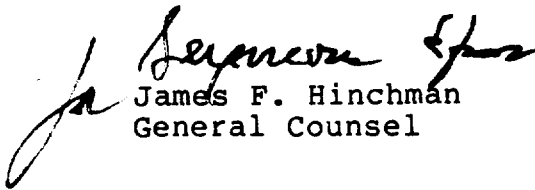
Our Bid Protest Regulations require that protests based on other than an apparent solicitation impropriety be filed within 10 working days after the basis for the protest is known or should have been known. 4 C.F.R. § 21.2(a)(2) (1988). According to the agency report, on May 17, 1989, shortly after the protest was filed, the protester was sent several documents, including the technical and cost evaluation summaries which indicated that the basis for the award decision was Comptek's technical superiority. The protester does not dispute that it received the information at that time. Since Norden was provided with the agency's technical and cost evaluation on May 17, its protest arguments which concern the specifics of these evaluations raised for the first time on July 10 when it filed its comments on the agency report with our Office are untimely. A protester may not introduce new issues in its comments that it could and should have raised earlier in the protest process. See Horizon Trading Co. Inc., et al., B-231177, July 26, 1988, 88-2 CPD ¶ 86.

Concerning the protester's original argument that as the low offeror it should have received the award, this solicitation provided that award would be made to the proposal judged most advantageous to the government, and stated that technical considerations were more important than cost. Here, the record shows that the evaluators concluded that Comptek's proposal was technically superior to the protester's primarily in the areas of corporate experience and personnel, the two most important factors, and therefore superior overall. This superiority determination was based upon Comptek's in-depth knowledge and broad experience in most of the specific tasks listed in the RFP as a result of its incumbency under the prior contract. We have upheld awards to higher rated offerors with higher proposed costs where the agency reasonably determined that the cost premium involved was justified considering the technical superiority of the selected offeror's proposal. See University of Dayton Research Inst., B-227115, Aug. 19, 1987, 87-2 CPD ¶ 178. Consequently, the agency's award to other than the lowest cost offeror is not objectionable. PECO Enters., Inc., B-232307, Oct. 27, 1988, 88-2 CPD ¶ 398.

Finally, while we agree with the protester that the Navy did not comply with the requirement of Federal Acquisition Regulation § 15.1001(c)(v) that the notice of award inform the unsuccessful offeror in general terms of the reason its proposal was not accepted, this does not affect the validity of the award. We have consistently held that a failure to comply with the notice provisions is only procedural in nature and does not provide a basis to sustain a protest.

Rainbow Technology, Inc., B-232589, Jan. 24, 1989, 89-1 CPD ¶ 66. While the protester has not agreed that it was prejudiced by the lack of information in the notice, it maintains that agencies will not furnish the required information in the notice unless we sustain protests concerning improper notification. We agree that the notification requirement is important; nonetheless, generally we have considered prejudice as an element of a valid protest because it is a very serious matter to disturb an award and we will not do so because of a technical deficiency in the award process. See Colt Inst. Inc., B-231213.2, Jan. 23, 1987, 87-1 CPD ¶ 49.

The protest is denied in part and dismissed in part.


James F. Hinchman
General Counsel